

October 28, 2018

The Honorable Jesse M. Furman
United States District Court for the Southern District of New York
40 Centre Street, Room 2202
New York, NY 10007

RE: Plaintiffs' letter-motion to compel production of documents in *State of New York, et al. v. U.S. Dep't of Commerce, et al.*, 18-CV-2921 (JMF).

Dear Judge Furman,

Plaintiffs seek disclosure of seven withheld documents that were conveyed outside the Commerce Department: (1) six that the Commerce Department disclosed to Mark Neuman; and (2) one transmitted by James Uthmeier to John Gore. *See* Ex. 1. Defendants fail to meet their burden of proving the claimed privileges apply. *In re County of Erie*, 473 F.3d 413, 418 (2d Cir. 2007). The parties were unable to resolve this dispute through meet-and-confer discussions. Plaintiffs request, pursuant to this Court's Rule 2(C), that the Court review these documents *in camera* to determine whether to order their disclosure.

1. Documents shared with Mark Neuman. Defendants advised Plaintiffs on October 24 and October 25 that six documents previously withheld on privilege grounds (AR 2021, 3731, 10249, 10285, 10296, COM_DIS 20920) had been shared with Mr. Neuman. Ex. 2; Ex. 3. Disclosing these documents to Mr. Neuman waives those privileges.

The attorney-client privilege (claimed for four documents) is waived because the documents were not kept confidential. Mr. Neuman is not a lawyer and the documents were not shared to obtain legal advice. Indeed, Plaintiffs previously contested an effort to shield records shared with Mr. Neuman, and Defendants withdrew privilege claims conceding that the privilege had been "mistakenly marked." Docket No. 254, ¶ 15. Defendants now cite *Trustees of Elec. Workers Local No. 26 v. Trust Fund Advisors*, 266 F.R.D. 1 (D.D.C. 2010), contending that a third-party "consultant and trusted adviser" falls within the privilege. Ex. 2. But in that case, the third parties were two attorneys and a paid investment advisor with a fiduciary relationship. *Trustees*, 266 F.R.D. at 3-7. Mr. Neuman is not a lawyer, paid advisor, or fiduciary.

The deliberative process privilege (claimed for five documents) is likewise waived. That privilege protects inter- or intra-agency communications, *Winfield*, 2018 WL 716013, at *4; but communications between Commerce and Mr. Neuman are not communications between government agencies. During the meet-and-confer, Defendants stated that because Mr. Neuman is a "trusted adviser," Ex. 2, these communications were covered by the "consultant corollary" identified in *Department of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001). But in opposing Plaintiffs' motion to depose Mr. Neuman, Defendants stated the opposite. *See* Docket No. 346 ("Mr. Neuman . . . was not acting as a high-level advisor to Secretary Ross, but rather was one of a large number of people who communicated information or opinions"). Defendants cannot change facts when it suits their purposes. *See Micilli v. Liddle & Robinson LLP*, No. 15-cv-2141 (JMF), 2016 WL 2997507, at * 4 (S.D.N.Y. May 23, 2016) (burden to establish privilege is "not discharged by mere conclusory or *ipse dixit* assertions").

The work-product protection (claimed for three documents) is waived as well. Defendants make no claim that the disclosures to Mr. Neuman were in aid of litigation or that they shared a “common adversary,” *Medinol, Ltd. v. Boston Sci. Corp.*, 214 F.R.D. 113, 116 (S.D.N.Y. 2002). Defendants’ assertions that these privileges extend to Mr. Neuman refer only to the attorney-client and deliberative process privileges, *see* Ex. 2, Ex. 3; and their privilege logs do not even identify the selective disclosures or explain how work-product protection attaches to Mr. Neuman, *see* Ex. 1. The work-product protection is waived.

2. *Note to Acting AAG John Gore.* Defendants have withheld on claims of deliberative process, attorney-client, and work product privilege a note from Mr. Uthmeier to Mr. Gore (DOJ15197) that accompanied a copy of the August 2017 Uthmeier Memo (which the Court separately considered at Docket No. 361). Defendants took the position during an October 26 meet-and-confer that any challenge to this privilege claim is untimely based on the October 24 status conference and subsequent scheduling order. (Docket No. 401.) Plaintiffs respectfully disagree. At the status conference, Plaintiffs described the possible need to compel disclosure of several documents in advance of Mr. Gore’s deposition, *see* Oct. 24 Tr. at 31; and the Court directed next-day briefing in light of the timing of that deposition, *id.* at 32-33. Because Plaintiffs learned new information about the withheld documents during the course of that status conference – including that DOJ15197 is a handwritten Post-It note, *id.* at 31, which is not reflected on the privilege log, *see* Ex. 1 – Plaintiffs concluded that instead of seeking to compel disclosure before Mr. Gore’s deposition, they should determine whether other new facts could be identified at the deposition to inform a privilege challenge. Information identified during the deposition contradicts the privilege log and establishes that no privileges apply to the note.¹

a. The deliberative process privilege applies to inter- or intra-agency documents that are both predecisional and deliberative. *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 356 (2d Cir. 2005). Based on the date the note was prepared (also not included on the privilege log, and discovered at Mr. Gore’s deposition), the note is post-decisional and therefore not protected by the privilege. The record has established that Secretary Ross and Attorney General Sessions spoke on September 17, 2017, the same day that the Attorney General’s aide told the Secretary’s Chief of Staff “[f]rom what John [Gore] told me, it sounds like we can do whatever you all need us to do.” Ex. 4. On September 22, Uthmeier called Gore, and they spoke about the citizenship question. Ex. 5 (Gore dep. tr. 105); Ex. 4. Shortly after that, Mr. Gore received by hand-delivery a copy of the Uthmeier Memo, with the accompanying note. Ex. 5 (Gore dep. tr. 106). These circumstances indicate that Commerce was conveying to the Justice Department “whatever you all need us to do,” Ex. 4, making the note post-decisional and not privileged.

If the deliberative process privilege does apply, the note should still be disclosed under the balancing test set out in *Winfield v. City of N.Y.*, 2018 WL 716013 (S.D.N.Y. Feb. 1, 2018). The seriousness of the litigation and the role of the agency weigh heavily in favor of disclosure here. *See* Tr. of Sept. 14 Conference, at 9-10. Even if disclosure may inhibit future candid debate among agency actors, *see id.* at 10, the two remaining factors – relevance of the evidence, and availability of other evidence – weigh in favor of disclosure. The circumstances surrounding

¹ If the Court did intend the order at Docket No. 401 as a deadline for any challenge to this withholding (as opposed to a deadline for pre-deposition challenge), Plaintiffs respectfully seek leave to file out of time, especially in light of new information that only became available to Plaintiffs during Mr. Gore’s deposition.

the exchange of these materials from Uthmeier to Gore – including the proximity to the Ross-Sessions call, the decision to hand-deliver a memo with a handwritten note that could easily have been emailed, and other evidence that Commerce officials were mindful of the record they were creating, Ex. 4 – suggest that the note contains relevant evidence of the Commerce Department’s intent not available from another source. The withheld note also contrasts with Defendants’ production of many other communications conveying the Uthmeier Memo. Ex. 6. The note should be reviewed *in camera* to determine whether it should be produced, in full or in part.

b. The attorney-client privilege “protects communications (1) between a client and his or her attorney (2) that are intended to be, and in fact were, kept confidential (3) for the purpose of obtaining or providing legal assistance.” *Brennan Ctr. for Justice v. DOJ*, 697 F.3d 184, 207 (2d Cir. 2012). The Gore deposition confirmed that the Commerce Department is not Mr. Gore’s client. Ex. 5 (Gore dep. tr. 35-37). “Where one consults an attorney not as a lawyer but as a friend or as a business adviser or banker, or negotiator . . . the consultation is not professional nor the statement privileged.” *In re Lindsey*, 158 F.3d 1263, 1270 (D.C. Cir. 1998) (quoting 1 McCormick on Evidence § 88). In addition, Mr. Gore testified that the note did *not* solicit legal advice from him, Ex. 5 (Gore dep. tr. 108), which contradicts the privilege log, *see* Ex. 1. Because the handwritten note was not prepared for the purpose of obtaining legal assistance, the privilege does not attach. *See Erie*, 473 F.3d at 420. Mr. Gore later gave conflicting testimony, and stated that the note did request legal advice. Ex. 5 (Gore dep. tr. 111). At minimum, this inconsistent testimony warrants *in camera* review of the note to determine whether the claim of privilege is well-founded, or whether redaction is available. *Erie*, 473 F.3d at 421-22 & n.8 (2d Cir. 2007) (discussing redaction and *in camera* review).

c. The attorney work-product doctrine protects documents “that are prepared in anticipation of litigation or for trial by or for another party or its representative.” Fed. R. Civ. P. 26(b)(3); *see In re General Motors LLC Ignition Switch Litig.*, 80 F. Supp. 3d 521, 531 (S.D.N.Y. 2015). Mr. Uthmeier delivered his handwritten note to Mr. Gore in September 2017; since Defendants assert that their decisionmaking process was not “initiated” until December 2017, AR 1313, Commerce could not reasonably have anticipated litigation months earlier.

Even assuming work-product applies, that protection is not absolute; the Court can compel disclosure where Plaintiffs have “substantial need . . . and cannot, without undue hardship, obtain their substantial equivalent by other means.” Fed. R. Civ. P. 26(b)(3)(A)(ii). Plaintiffs have demonstrated substantial need for disclosure of the note given the unusual circumstances surrounding transmittal of the Uthmeier Memo to Mr. Gore. As the Court has recognized and Defendants have acknowledged, the Commerce Department’s intent is at issue in this case. *New York v. U.S. Dep’t of Commerce*, No. 18-cv-2921 (JMF), 2018 WL 4539659, at *2-3 (Sept. 21, 2018). As described above, the timing and form of these materials strongly indicate that they communicate the Commerce Department’s intent, because they were responsive to the offer that Justice would do “whatever [Commerce] need[s] us to do.” Ex. 4. At minimum, the note should be reviewed *in camera* to assess Plaintiffs’ request for Rule 26(b)(3)(A)(ii) disclosure on grounds of substantial need.

Respectfully submitted,

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Exhibit 1

Row	Prod.:Beg. Bates	Prod.:End Bates	Prod.:Beg. Attach.	Prod.:End Attach.	To	From	CC	Date/Sent	Author	Date/Created	Filename	Redacted or WIF	Privilege	Privilege Log Description
422	DOJ00015197	DOJ00015197	DOJ00015197	DOJ00015197	N/A	N/A	N/A					WIF	ACP; AWP; DPP	Note from James Uthmeier to John Gore accompanying memorandum written by James Uthmeier. Uthmeier prepared this document for the purpose of obtaining legal advice from the Department of Justice, and in anticipation of litigation. This document was considered by DOJ to aid in their deliberations concerning whether to request the addition of a citizenship question.
423	DOJ00015198	DOJ00015198	DOJ00015198	DOJ00015198	N/A	N/A	N/A					WIF	ACP; AWP; DPP	Memorandum written by James Uthmeier for the purpose of providing legal advice to his client and to aid in Commerce's deliberations about whether or not to add a citizenship question to the census, and in anticipation of litigation. The document was also shared with John Gore for the purpose of obtaining legal advice from the Department of Justice, and considered by DOJ to aid in their deliberations concerning whether to request the addition of a citizenship question.
424	DOJ00015199	DOJ00015199	DOJ00015199	DOJ00015199	N/A	N/A	N/A					WIF	DPP	
425	DOJ00015200	DOJ00015200	DOJ00015200	DOJ00015200	N/A	N/A	N/A					WIF	DPP	Draft powerpoint presentation containing deliberative material on the critical objective for Census 2020.
426	DOJ00015201	DOJ00015201	DOJ00015201	DOJ00015201	Teramoto, Wendy (Federal); Gore, John (CRT)	Teramoto, Wendy (Federal)	N/A	9/13/17 5:12 PM			Call with John Gore-Justice .msg	Redacted	PII	PII redacted to avoid unsolicited contact.
427	DOJ00015202	DOJ00015202	DOJ00015202	DOJ00015202	Gore, John (CRT)	SLeach@doc.gov - on behalf of - Teramoto, Wendy (Federal)	N/A	9/13/17 5:11 PM			Call with John Gore-Justice .msg	Redacted	PII	PII redacted to avoid unsolicited contact
428	DOJ00015203	DOJ00015203	DOJ00015203	DOJ00015203	Toomey, Kathleen (CRT)	Unspecified Sender	N/A	5/8/18 9:40 AM			RE: Census Question Litigation: LITIGATION HOLD.msg	WIF	ACP; AWP; PII	Internal communication regarding preservation obligations as a result of recently-filed lawsuits involving the citizenship question on the 2020 Census.
429	DOJ00015204	DOJ00015204	DOJ00015204	DOJ00015331	Aguíñaga, Ben (CRT)	Toomey, Kathleen (CRT)	N/A	5/8/18 9:39 AM			FW: Census Question Litigation: LITIGATION HOLD.msg	WIF	ACP; AWP; PII	Internal communication regarding preservation obligations as a result of recently-filed lawsuits involving the citizenship question on the 2020 Census.

Prod.: Beg. Bates	Prod.: End Bates	Prod.: Beg. Attach.	Prod.: End Attach.	To	From	CC	Date/Sent	AUTHOR	DATE TIME CRTD	File Name	Privilege	Privilege Comments
0002013	0002013	0002013	0002013	Davidson, Peter (Federal)	James Uthmeier	Walsh, Michael (Federal)	3/20/2018 10:37			Re: DOC Morning News Clips for Tuesday, March 20, 2018.msg	AC - Attorney Client Privilege; PII - Personal Privacy	Attorney communications re citizenship question
0002013	0002013	0002013	0002013	Davidson, Peter (Federal)	Uthmeier, James (Federal)	Walsh, Michael (Federal)	3/20/2018 10:37			Re: DOC Morning News Clips for Tuesday, March 20, 2018.msg	PII - Personal Privacy	
0002014	0002014	0002014	0002016	Walsh, Michael (Federal)	James Uthmeier		3/6/2018 16:30			Fwd: checklist for compiling administrative record.msg	AC - Attorney Client Privilege; WP - Work Product	Email from DOJ on compiling administrative record
0002015	0002015	0002014	0002016	N/A	N/A			jgriffit	2/23/2018 2:51 PM	Administrative Record checklist.pdf	AC - Attorney Client Privilege; WP - Work Product	DOJ administrative record checklist
0002016	0002016	0002014	0002016	N/A	N/A		7/00/2015	jgriffit	2/23/2018 2:51 PM	DOJ APA monograph (2015).pdf	AC - Attorney Client Privilege; WP - Work Product	DOJ monograph on APA litigation
0002017	0002017	0002017	0002017	Shumate, Brett A. (CIV)	James Uthmeier		2/27/2018 14:05			Re: DOJ matter.msg	AC - Attorney Client Privilege; PII - Personal Privacy; WP - Work Product	Emails between Commerce counsel and DOJ about DOC matter in anticipation of litigation
0002018	0002019	0002018	0002019	Freitas, Jessica (Federal Employee)	James Uthmeier	Kelley, Karen (Federal)	2/6/2018 19:54			Re: Memo: Census Questions Around the World.msg	AC - Attorney Client Privilege; PII - Personal Privacy; WP - Work Product; DP - Deliberative Process	Emails between counsel about revising draft memo
0002020	0002020	0002020	0002021	Lenihan, Brian (Federal)	James Uthmeier		2/5/2018 16:20			Fwd: .msg	AC - Attorney Client Privilege; PII - Personal Privacy	Attorney communications re draft memo
0002021	0002021	0002020	0002021	Uthmeier, James	Freitas, Jessica		1/9/2018	Jessica Freitas	1/9/2018 12:28 PM	Arbitrary & Capricious Memo.docx	AC - Attorney Client Privilege	Draft attorney memo re legal research
0002022	0002022	0002022	0002022	Willard, Aaron (Federal)	James Uthmeier		1/29/2018 17:57			Re: Steering committee meeting tomorrow.msg	AC - Attorney Client Privilege; PII - Personal Privacy; WP - Work Product	Email from counsel about follow-up request
0002023	0002023	0002023	0002023	Willard, Aaron (Federal)	James Uthmeier	Park-Su, Sahra (Federal)	1/29/2018 08:56			Re: Steering committee meeting tomorrow.msg	AC - Attorney Client Privilege; PII - Personal Privacy; WP - Work Product	Email from counsel about follow-up request

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0003726	0003726	0003726	0003726	Robinson, Barry (Federal)	Uthmeier, James (Federal)		1/7/2018 10:51			PL-DOC-WH_194, 196, 197-0 20180107 1052AM Re Revised Opinion on DOJ Census Questionnaire Request - Citizenship_mc.msg	AC - Attorney Client Privilege; WP - Work Product; DP - Deliberative Process	Emails between counsel about draft legal memo
0003727	0003727	0003727	0003727	Robinson, Barry (Federal)	Uthmeier, James (Federal)		1/7/2018 12:21			PL-DOC-WH_194, 196, 197-0 20180107 1222PM Re Revised Opinion on DOJ Census Questionnaire Request - Citizenship_mc.msg	AC - Attorney Client Privilege; WP - Work Product; DP - Deliberative Process	Emails between counsel about draft legal memo
0003728	0003728	0003728	0003729	Davidson, Peter (Federal)	Uthmeier, James (Federal)		1/8/2018 14:12			PL-DOC-WH_202-0 20180108 212PM FW Revised Opinion on DOJ Census Questionnaire Request - Citizenship_mc_2_010818.msg	AC - Attorney Client Privilege; WP - Work Product; DP - Deliberative Process	Emails between counsel about draft legal memo
0003729	0003729	0003728	0003729	Uthmeier, James	Robinson, Barry		1/8/2018	Robinson, Barry (Federal)	1/8/2018 1:55 PM	Revised Opinion on DOJ Census Questionnaire Request - Citizenship_mc_2_010818.docx	AC - Attorney Client Privilege; WP - Work Product; DP - Deliberative Process	Draft legal memo on DOJ request to reinstate citizenship question
0003730	0003730	0003730	0003731	Davidson, Peter (Federal)	Hyson, Beverly (Federal)	Uthmeier, James (Federal)	1/9/2018 15:17			PL-DOC-WH_211-0 20180109 317PM Revised Opinion on DOJ Census Questionnaire Request - Citizenship_ju_1_9_18.msg	AC - Attorney Client Privilege; WP - Work Product; DP - Deliberative Process	Email between counsel about draft legal memo
0003731	0003731	0003730	0003731	Davidson, Peter; Uthmeier, James	Robinson, Barry		1/9/2018	Robinson, Barry (Federal)	1/9/2018 3:07 PM	Revised Opinion on DOJ Census Questionnaire Request - Citizenship_ju_1_9_18.docx	AC - Attorney Client Privilege; WP - Work Product; DP - Deliberative Process	Pre-decisional draft legal memo on DOJ request to reinstate citizenship question
0003732	0003732	0003732	0003733	Davidson, Peter (Federal)	Uthmeier, James (Federal)		1/10/2018 08:39			PL-DOC-WH_221-0 20180110 839AM FW Revised Opinion on DOJ Census Questionnaire Request - Citizenship_ju_1_9_18.msg	AC - Attorney Client Privilege; WP - Work Product; DP - Deliberative Process	Emails between counsel about draft legal memo

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0010244	0010244	0010244	0010244	N/A	N/A		3/15/2018	No metadata available	7/20/2018 9:46 AM	kdk call agenda for secretary ross, march 15, 2018.pdf	DP - Deliberative Process	Internal pre-call briefing for Secretary Ross and handwritten notes
0010245	0010245	0010245	0010245	N/A	Census Bureau		3/9/2018	No metadata available	7/20/2018 9:46 AM	kdk Camerota, Steve - briefing memo for secretary ross, march 13, 2018.pdf	DP - Deliberative Process	Internal pre-call briefing memo for Secretary Ross with handwritten notes
0010246	0010246	0010246	0010246	N/A	Platt, Mike		3/9/2018	No metadata available	7/20/2018 9:46 AM	kdk Carper, Tom - briefing memo for secretary ross, march 12, 2018.pdf	DP - Deliberative Process	Internal pre-call briefing memo for SWR with handwritten notes
0010248	0010248	0010248	0010248	N/A	N/A		After 1/31/2018	No metadata available	7/20/2018 9:46 AM	kdk census memo, 2018.pdf	DP - Deliberative Process	Draft of potential census memo from Secretary with handwritten notes
0010249	0010249	0010249	0010249	Kelley, Karen Dunn; Uthmeier, James	Feitas, Jessica		2/5/2018	No metadata available	7/20/2018 9:46 AM	kdk census questions around the world, Feb. 5, 2018.pdf	AC - Attorney Client Privilege; WP - Work Product; DP - Deliberative Process	Draft pre-decisional memo from counsel re census citizenship question in foreign countries with handwritten notes
0010250	0010250	0010250	0010250	N/A	Platt, Mike		3/14/2018	No metadata available	7/20/2018 9:46 AM	kdk Connolly, Gerry - briefing memo for secretary ross, march 15, 2018.pdf	DP - Deliberative Process	Pre-call briefing memo for Secretary Ross with handwritten notes
0010251	0010251	0010251	0010251	N/A	N/A			No metadata available	7/18/2018 6:37 PM	KDK Copy of answered Questions w notes.pdf	DP - Deliberative Process	Handwritten notes on internal draft questions on Jan 19 draft census memo on citizenship question reinstatement request
0010273	0010273	0010273	0010273	Ross, Wilbur	Abrowd, John		2/5/2018	No metadata available	7/18/2018 6:39 PM	KDK Copy of Jan 19 memo w notes (2).pdf	DP - Deliberative Process	Predecisional draft of January 19, 2018 Abowd memo with handwritten notes

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0010281	0010284	0010281	0010284	N/A	N/A		7/22/1991	No metadata available	7/19/2018 7:56 PM	kdk fed register, part III Dept. of Commerce, july 22, 1991.pdf	DP - Deliberative Process	Handwritten deliberative pre-decisional notes redacted
0010285	0010285	0010285	0010285	N/A	N/A			No metadata available	7/20/2018 9:46 AM	kdk final record, Feb. 2018.pdf	AC - Attorney Client Privilege; WP - Work Product; DP - Deliberative Process	Predecisional draft list of administrative record considerations
0010286	0010286	0010286	0010286	N/A	N/A			No metadata available	7/20/2018 9:46 AM	kdk final record.pdf	AC - Attorney Client Privilege; WP - Work Product; DP - Deliberative Process	Predecisional draft list of administrative record considerations
0010287	0010287	0010287	0010287	N/A	N/A		2/22/2018	No metadata available	7/19/2018 7:58 PM	KDK FOIA Requests on SOGI and Citizenship FY17 and FY18 02222018.pdf	WP - Work Product; DP - Deliberative Process	Internal list and status of pending FOIA requests on citizenship and SOGI question
0010288	0010288	0010288	0010288	N/A	N/A		2/22/2018	No metadata available	7/20/2018 9:46 AM	kdk follow-up census issues, February 22, 2018.pdf	DP - Deliberative Process	Pre-meeting agenda for internal meeting, with handwritten notes
0010289	0010289	0010289	0010289	N/A	Platt, Mike		3/9/2018	No metadata available	7/20/2018 9:46 AM	kdk Hood, Jim - briefing memo for secretary ross, march 12, 2018.pdf	DP - Deliberative Process	Pre-call briefing memo with suggested talking points for Secretary's call with Attorney General Hood, with handwritten notes
0010290	0010290	0010290	0010290	N/A	Lenihan, Brian		3/9/2018	No metadata available	7/20/2018 9:46 AM	kdk Howard, Jerry - briefing memo for secretary ross, march 13, 2018.pdf	DP - Deliberative Process	Pre-call briefing memo with suggested talking points for Secretary's call with Attorney Jerry Howard, with handwritten notes
0010291	0010291	0010291	0010291	Ross, Wilbur	Abrowd, John		1/19/2018	No metadata available	7/18/2018 6:33 PM	KDK Jan 19 Abowd memo w notes.pdf	DP - Deliberative Process	Predecisional draft of January 19, 2018 Abowd memo with handwritten notes

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0010292	0010292	0010292	0010292	N/A	Platt, Mike		3/9/2018	No metadata available	7/20/2018 9:46 AM	kdk Johnson, Ron - briefing memo for secretary ross, march 9, 2018.pdf	DP - Deliberative Process	Pre-call briefing memo with suggested talking points for Secretary's call with Senator Ron Johnson, with handwritten notes
0010293	0010293	0010293	0010293	N/A	Platt, Mike		3/9/2018	No metadata available	7/20/2018 9:46 AM	kdk Landry, Jeff - briefing memo for secretary ross, march 12, 2018.pdf	DP - Deliberative Process	Pre-call briefing memo with suggested talking points for Secretary's call with Attorney General Landry, with handwritten notes
0010294	0010294	0010294	0010294	N/A	Platt, Mike		3/9/2018	No metadata available	7/20/2018 9:46 AM	kdk Maloney, Carolyn - briefing memo for secretary ross, march 9, 2018.pdf	DP - Deliberative Process	Pre-call briefing memo with suggested talking points for Secretary's call with Rep. Maloney, with handwritten notes
0010295	0010295	0010295	0010295	N/A	Platt, Mike		3/9/2018	No metadata available	7/20/2018 9:46 AM	kdk Maloney, Carolyn - briefing memo for secretary ross, march 12, 2018 (2).pdf	DP - Deliberative Process	Pre-call briefing memo with suggested talking points for Secretary's call with Rep. Maloney, with handwritten notes
0010296	0010296	0010296	0010296	N/A	N/A		2/23/2018	No metadata available	7/19/2018 8:16 PM	kdk memo of understanding updates.pdf	DP - Deliberative Process	Draft chart of MOU updates with handwritten notes and internal draft pre-decisional list of materials to be considered by Secretary
0010297	0010297	0010297	0010297	N/A	Platt, Mike		3/9/2018	No metadata available	7/20/2018 9:46 AM	kdk Miller, Tom - briefing memo for secretary ross, march 12, 2018.pdf	DP - Deliberative Process	Pre-call briefing memo with suggested talking points for Secretary's call with Attorney General Tom Miller, with handwritten notes

1422	COM_DIS00020872	COM_DIS00020872	COM_DIS00020872	COM_DIS00020872				Austin Schnell	EC Census Memo Draft Aug 11 2017 ec edits reprint.docx		8/28/2018 17:26	WIF	ACP; DPP; WP	Legal memorandum written by attorney for the purpose of providing legal advice to his client and to aid in Commerce's deliberations about whether or not to add a citizenship question to the census in track changes, prepared in anticipation of litigation following the decision.
1423	COM_DIS00020873	COM_DIS00020873	COM_DIS00020873	COM_DIS00020873				Rockas, James (Federal)	EC jgr edits DRAFT STATEMENT TPs FAQs CITIZENSHIP Q SUPPLEMENT_V1 + MC ec.docx		7/23/2018 17:26	WIF	ACP; DPP; WP	Attorney edits to draft public statement regarding the reinstatement of a citizenship question to the census, including opinions, advice, and recommendations.
1424	COM_DIS00020920	COM_DIS00020920	COM_DIS00020920	COM_DIS00020920					DL 2020 Census Senior Management Meeting Agenda.pdf		9/14/2018 12:21	WIF	DPP	Draft list of Commerce discussion topics for Census senior management regarding citizenship question with handwritten notes, which include opinions, advice, and recommendations.
1425	COM_DIS00020921	COM_DIS00020921	COM_DIS00020921	COM_DIS00020921					DL Technical Review of the Department of Justice to add Citizenship Question to the 2020 Census.pdf		9/14/2018 12:20	WIF	DPP	Handwritten notes on non-final draft of Census Jan 19 memo with handwritten notes by Langdon, including opinions, advice, and recommendations.
1426	COM_DIS00020964	COM_DIS00020964	COM_DIS00020964	COM_DIS00020964				Reist, Burton H (CENSUS/ADDC FED)	SPS 3.1.18_edits_HOGR_10-12-17 Hearing_QFRs.docx		3/1/2018 16:25	WIF	DPP	Non-final draft responses to Congressional QFRs for HOGR Hearing in track changes, including opinions, advice, and recommendations.
1427	COM_DIS00020965	COM_DIS00020965	COM_DIS00020965	COM_DIS00020965					SPS 2020 Census Steering Committee.pdf		9/14/2018 11:38	WIF	DPP	Handwritten notes on Census presentation illustrating opinions, advice, and recommendations on the presentation.
1428	COM_DIS00020966	COM_DIS00020966	COM_DIS00020966	COM_DIS00020966					SPS Citizenship Inquiries on the Decennial Census.pdf		9/14/2018 11:27	WIF	ACP; DPP; WP	Legal memorandum written by attorney for the purpose of providing legal advice to his client and to aid in Commerce's deliberations about whether or not to add a citizenship question with handwritten notes, prepared in anticipation of litigation following the decision.
1429	COM_DIS00020968	COM_DIS00020968	COM_DIS00020968	COM_DIS00020968					SPS Did Census Make Recommendations the last time a question was added.pdf		9/14/2018 11:22	WIF	ACP; DPP; WP	Attorney notes on Census answers to Commerce questions on Census Jan 19 memo, including opinions, advice, and recommendations.
1430	COM_DIS00020969	COM_DIS00020974	COM_DIS00020969	COM_DIS00020974					SPS Email chain re Alternatives Memo.pdf		9/14/2018 11:23	Redacted	PII	PII redacted for privacy purposes.
1431	COM_DIS00020975	COM_DIS00020975	COM_DIS00020975	COM_DIS00020975					SPS Final Record.pdf		9/14/2018 11:28	WIF	DPP	Non-final draft list of documents relevant to the Secretary's decision memo, with handwritten notes, including opinions, advice, and recommendations.
1432	COM_DIS00020976	COM_DIS00020978	COM_DIS00020976	COM_DIS00020978					SPS FOIA Requests re SOGI & Citizenship. Opinions, advice, and recommendations regarding how to comply with then-pending FOIA requests redacted.		9/14/2018 11:32	Redacted	DPP; WP	
1433	COM_DIS00020979	COM_DIS00020979	COM_DIS00020979	COM_DIS00020979				Maryann M Chapin (CENSUS/ADDC FED)	SPS Hearing Prep 5_8_18.docx		5/14/2018 12:05	WIF	DPP	Draft talking points for Congressional testimony, including opinions, advice, and recommendations.
1434	COM_DIS00020980	COM_DIS00020980	COM_DIS00020980	COM_DIS00020980				Freitas, Jessica (Federal Employee)	SPS International Censuses - Combined 2.7.18.docx		2/7/2018 9:07	WIF	ACP; DPP; WP	Draft legal memo on use of citizenship question on international censuses, including legal opinions, advice, and recommendations..
1435	COM_DIS00020981	COM_DIS00020981	COM_DIS00020981	COM_DIS00020981					SPS Memo Legal Review of DOJ's Request.pdf		9/14/2018 11:23	WIF	ACP; DPP; WP	Non-final draft of legal memo analyzing DOJ's request letter with comment bubbles, prepared in anticipation of litigation following the decision and including opinions, advice, and recommendations..
1436	COM_DIS00020982	COM_DIS00020983	COM_DIS00020982	COM_DIS00020983					SPS Outstanding Decennial Correspondence February 23.pdf		9/14/2018 11:33	Redacted	DPP	Draft list of correspondence regarding citizenship question with handwritten notes, including opinions, advice, and recommendations.

Exhibit 2

From: [Bailey, Kate \(CIV\)](#)
To: [Goldstein, Elena](#); [Freedman, John A.](#); [DHo@aclu.org](#); [Federighi, Carol \(CIV\)](#); [Coyle, Garrett \(CIV\)](#); [Kopplin, Rebecca M. \(CIV\)](#); [Halainen, Daniel J. \(CIV\)](#); [Tomlinson, Martin M. \(CIV\)](#); [Ehrlich, Stephen \(CIV\)](#); [Wells, Carlotta \(CIV\)](#)
Cc: [Sarah Brannon](#); [Gersch, David P.](#); [Colangelo, Matthew](#)
Subject: RE: 18-cv-2921: meet and confer
Date: Friday, October 26, 2018 7:43:08 PM

Counsel,

Thank you for speaking with us earlier this evening. As we discussed on the call, we have withdrawn our assertion of privilege over the document described in the seventh bullet point of Brad Rosenberg's 2:33pm yesterday email to Shankar Duraiswamy. We have notified Mr. Neuman's counsel and expect that he will produce that document to you directly.

This is to confirm that we maintain our assertions of privilege over the other six documents referenced in Brad's email. As we explained, disclosure of the documents to Mr. Neuman does not waive attorney-client privilege due to his role as a consultant and trusted adviser to senior officials at the Department of Commerce. *See Trustees of Elec. Workers Local No. 26 v. Trust Fund Advisors*, 266 F.R.D. 1, 7-9 (D.D.C. 2010). We also have asserted deliberative-process privilege over the documents you raised during our call. Regarding Bates 5418, as indicated in Brad's email, that document appears in our privilege logs in multiple places, including 3731, 3733, and 8568. We have therefore asserted deliberative-process privilege over this document and will continue to do so. We will also continue to assert deliberative-process privilege over Bates 2021, as asserted at Bates 3735.

Thank you,

Kate Bailey
Trial Attorney
United States Department of Justice
Civil Division – Federal Programs Branch
1100 L Street, NW
Washington, D.C. 20005
202.514.9239 | kate.bailey@usdoj.gov

Exhibit 3

From: Rosenberg, Brad (CIV) <Brad.Rosenberg@usdoj.gov>

Sent: Thursday, October 25, 2018 2:33 PM

To: Duraiswamy, Shankar <sduraiswamy@cov.com>; Howard Feldman <hfeldman@feldman-wasser.com>; Altvater, B.J., <BAltvater@cov.com>; Stan Wasser <swasser@feldman-wasser.com>

Cc: Gardner, Joshua E (CIV) <Joshua.E.Gardner@usdoj.gov>

Subject: RE: NY v. Dept of Commerce

Hi Shankar:

Following-up on and updating my email below, we have identified seven documents in Mr. Neuman's possession that we are withholding on the basis of the deliberative process privilege:

- The first document is a January 9, 2018 memorandum from Barry Robinson to Peter Davidson and James Uthmeier. The document appears in the government's privilege logs at Bates Nos. 3731, 3733, 5418, and 8568.

- The second document is a pre-decisional draft list of materials to be considered by the Secretary and appears in the government's privilege logs at Bates No. 10296. The version of this document in Mr. Neuman's files is one page shorter than the version reflected in the privilege log, as it does not contain the "Draft chart of MOU updates" described in the log. The version of the document in Mr. Neuman's files also does not contain any handwritten notes.
- The third document is a pre-decisional draft list of administrative record considerations that appears in the government's privilege logs at Bates No. 10285.
- The fourth document is a Feb. 5, 2018 memorandum from Jessica Freitas to Karen Dunn Kelley & James Uthmeier. The document appears in the government's privilege logs at Bates No. 10249, though the version of the document in Mr. Neuman's files does not contain any handwritten notes.
- The fifth document is a draft of a Jan. 9, 2018 Memo with blank "To" and "From" fields. Though the exact version of this draft does not appear on our privilege logs, a subsequent version of this document (with the "To" and "From" fields filled-in) are logged at Bates Nos. 2021 and 3735.
- The sixth document is a draft list of Commerce discussion topics for Census senior management that appears in the government's privilege logs at Bates No. COM_DIS00020920, though the version of this document in Mr. Neuman's files does not contain any handwritten notes.
- The seventh document does not appear on our privilege logs and is being identified here. It is a list of topics/questions regarding the citizenship question.

I am attaching the referenced privilege logs for your convenience. Please do not hesitate to contact me with any questions.

Thanks,
-Brad

From: Rosenberg, Brad (CIV)
Sent: Wednesday, October 24, 2018 5:26 PM
To: 'Duraiwamy, Shankar' <sduraiwamy@cov.com>; Howard Feldman <hfeldman@feldman-wasser.com>
Cc: A. Mark Neuman (amarkneu@aol.com) <amarkneu@aol.com>; Stan Wasser <swasser@feldman-wasser.com>; Altvater, B.J., <BAltvater@cov.com>; Gardner, Joshua E (CIV) <igardner@CIV.USDOJ.GOV>
Subject: RE: NY v. Dept of Commerce

Hi Shankar:

As Howard noted in his email below, we have identified five documents in Mr. Neuman's possession on which the government is asserting a privilege and that are being withheld. We believe that all five documents, or versions of those documents, have previously been

identified on the government's privilege logs, but are in the process of confirming that. I hope to follow-up with more information about those documents, including identifying where they appear on those logs, shortly.

Thanks,
-Brad

From: Duraiswamy, Shankar [<mailto:sduraiswamy@cov.com>]
Sent: Wednesday, October 24, 2018 9:47 AM
To: Howard Feldman <hfeldman@feldman-wasser.com>
Cc: A. Mark Neuman (amarkneu@aol.com) <amarkneu@aol.com>; Stan Wasser <swasser@feldman-wasser.com>; Rosenberg, Brad (CIV) <BRosenbe@civ.usdoj.gov>; Altvater, B.J., <BAltvater@cov.com>
Subject: RE: NY v. Dept of Commerce

Howard,

Thanks for the update. A few responses:

1. Please send the documents that are not allegedly privileged asap. Given the timing we need to review them promptly and don't want to wait on the privilege log.
2. Please let me know who at the government you have been dealing with on privilege issues, so we know who to reach out to.
3. If you are withholding any documents based on an NDA, please identify what the NDA says about providing information or documents pursuant to court order or legal process. Thanks.

Best regards,
Shankar

-----Original Message-----

From: Howard Feldman <hfeldman@feldman-wasser.com>
Sent: Wednesday, October 24, 2018 9:35 AM
To: Duraiswamy, Shankar <sduraiswamy@cov.com>
Cc: A. Mark Neuman (amarkneu@aol.com) <amarkneu@aol.com>; Stan Wasser <swasser@feldman-wasser.com>; Rosenberg, Brad (CIV) <Brad.Rosenberg@usdoj.gov>
Subject: RE: NY v. Dept of Commerce

Going to work on that this morning. There are a few documents that the government is claiming a privilege and I will provide as close as I can to a detailed privilege log. Those issues are between you and the government but I do not want my client to get into trouble releasing documents that are privileged.

Howard W. Feldman
Attorney and Counselor at Law
FeldmanWasser
Post Office Box 2418
1307 South 7th Street
Springfield, Illinois 62705
Office 217-544-3403

Fax 217-544-1593

www.feldman-wasser.com

hfeldman@feldman-wasser.com

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-----Original Message-----

From: Duraiswamy, Shankar <sduraiswamy@cov.com>
Sent: Wednesday, October 24, 2018 8:29 AM
To: Howard Feldman <hfeldman@feldman-wasser.com>
Cc: Altvater, B.J., <BAltvater@cov.com>
Subject: RE: NY v. Dept of Commerce

I'm working on finding out. Where are we on documents?

-----Original Message-----

From: Howard Feldman <hfeldman@feldman-wasser.com>
Sent: Wednesday, October 24, 2018 9:26 AM
To: Duraiswamy, Shankar <sduraiswamy@cov.com>
Subject: RE: NY v. Dept of Commerce

Thank you-do you have a count on the number of lawyers attending?

Howard W. Feldman
Attorney and Counselor at Law
FeldmanWasser
Post Office Box 2418
1307 South 7th Street
Springfield, Illinois 62705
Office 217-544-3403
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-----Original Message-----

From: Duraiswamy, Shankar <sduraiswamy@cov.com>
Sent: Wednesday, October 24, 2018 7:56 AM
To: Howard Feldman <hfeldman@feldman-wasser.com>

Cc: Stan Wasser <swasser@feldman-wasser.com>; Altvater, B.J., <BAltvater@cov.com>

Subject: Re: NY v. Dept of Commerce

Okay, thanks. Please keep in mind that we have seven hours on the record and while we don't expect to use all seven, we may well have to go past 5 pm.

Sent from my iPhone

On Oct 23, 2018, at 6:27 PM, Howard Feldman <hfeldman@feldman-wasser.com<mailto:hfeldman@feldman-wasser.com>> wrote:

Mr. Neuman has indicated he can start at noon. That should be enough time I hope to get you out of here and on your way. Not that Illinois cannot use the extra revenue of staying the night. However, given the night getting you home is a good thing. I hope that helps a little. I will address the documents tomorrow.

Howard

Howard W. Feldman
Attorney and Counselor at Law
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1307 South 7th Street
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From: Duraiswamy, Shankar <sduraiswamy@cov.com<mailto:sduraiswamy@cov.com>>
Sent: Tuesday, October 23, 2018 5:11 PM
To: Howard Feldman <hfeldman@feldman-wasser.com<mailto:hfeldman@feldman-wasser.com>>
Subject: RE: NY v. Dept of Commerce

Howard,

Can we start at 11 am? That would hopefully avoid our having to stay into Sunday evening and allow us to travel from and back to DC in the same day.

In addition, can you please produce asap the documents that you were prepared to produce before the stay was imposed? Thanks.

Exhibit 4

From: [REDACTED]@doc.gov
Sent: 9/18/2017 12:24:55 AM
To: Cutrona, Danielle (OAG) [REDACTED]
Subject: Re: Call

They connected. Thanks for the help. Wendy

Sent from my iPhone

On Sep 17, 2017, at 12:10 PM, Cutrona, Danielle (OAG) <[REDACTED]> wrote:
Wendy,

The Attorney General is available on his cell. His number is 2[REDACTED]. He is in Seattle so he is 3 hours behind us. From what John told me, it sounds like we can do whatever you all need us to do and the delay was due to a miscommunication. The AG is eager to assist. Please let me know if you need anything else. You can reach me at [REDACTED].

Thanks,

Danielle

Sent from my iPhone

On Sep 17, 2017, at 10:08 AM, Cutrona, Danielle (OAG) <[REDACTED]> wrote:
Checking now. Will let you know as soon as I hear from him.

Sent from my iPhone

On Sep 16, 2017, at 6:29 PM, Teramoto, Wendy (Federal) <[REDACTED]> wrote:
Thanks. Danielle-pls let me know when the AG is available to speak to Secretary Ross. Thanks. Anytime on the weekend is fine too. W

Sent from my iPhone

On Sep 16, 2017, at 3:55 PM, Gore, John (CRT) <[REDACTED]> wrote:
Wendy:

By this email, I introduce you to Danielle Cutrona from DOJ. Danielle is the person to connect with about the issue we discussed earlier this afternoon.

Danielle:

Wendy's cell phone number is [REDACTED]

Thanks.

Sent from my iPhone

On Sep 13, 2017, at 4:57 PM, Teramoto, Wendy (Federal) <[REDACTED]> wrote:

Yes. CC'ing macie to set up. Look forward to connecting. W

Sent from my iPhone

On Sep 13, 2017, at 4:44 PM, Gore, John (CRT) <[REDACTED]> wrote:
Wendy:

My name is John Gore, and I am an acting assistant attorney general in the Department of Justice. I would like to talk to you about a DOJ-DOC issue. Do you have any time on your schedule tomorrow (Thursday) or Friday for a call?

Thanks.

John M. Gore
Acting Assistant Attorney General
Civil Rights Division
U.S. Department of Justice
[REDACTED]
[REDACTED]

From: Legore-Traore, Camille (CRT)
Sent: Friday, September 22, 2017 12:44 PM
To: Gore, John (CRT)
Subject: phone message

Hi John,

Mr. James Uthmeier (Dept. of Commerce) called. He spoke with you in the past regarding some matters. Could you please return his call, [REDACTED] PII [REDACTED]

Thanks!

From: Wilbur Ross [REDACTED] PII
Sent: 8/10/2017 7:38:25 PM
To: Comstock, Earl (Federal) [REDACTED] PII
Subject: Re: Census Matter

I would like to be briefed on Friday by phone. I probably will need an hour or so to study the memo first. we should be very careful, about everything, whether or not it is likely to end up in the SC. WLR

Sent from my iPad

> On Aug 9, 2017, at 10:24 AM, Comstock, Earl (Federal) [REDACTED] PII [REDACTED] wrote:
>
> PREDECISIONAL AND ATTORNEY-CLIENT PRIVILEGED
>
> Mr. Secretary - we are preparing a memo and full briefing for you on the citizenship question. The memo will be ready by Friday, and we can do the briefing whenever you are back in the office. Since this issue will go to the Supreme Court we need to be diligent in preparing the administrative record.
>
> Earl
>
> On 8/8/17, 1:20 PM, "Wilbur Ross" [REDACTED] PII [REDACTED] wrote:

> [REDACTED] Not Responsive / Deliberative
[REDACTED] Not Responsive / Deliberative [REDACTED] were you on the call this morning about Census? They seem dig in about not sing the citizenship question and that raises the question of where is the DOJ in their analysis? If they still have not come to a conclusion please let me know your contact person and I will call the AG. Wilbur Ross

>
> Sent from my iPhone
>
>> On Aug 8, 2017, at 10:52 AM, Comstock, Earl (Federal) [REDACTED] PII [REDACTED] wrote:
>>
>> [REDACTED] Not Responsive / Deliberative
>
>

Exhibit 5

1
UNCERTIFIED DRAFT TRANSCRIPT

1

2 N O T I C E

3 This transcript is an UNCERTIFIED ROUGH
4 DRAFT TRANSCRIPT ONLY. It contains the raw output

5 from the court reporter's stenotype machine

6 translated into English by the court reporter's

7 computer, without the benefit of proofreading. It

8 will contain untranslated steno outlines,

9 mistranslations (wrong words), and misspellings.

10 These and any other errors will be

11 corrected in the final transcript. Since this

12 rough draft transcript has not been proofread, the

13 court reporter cannot assume responsibility for

14 any error. This rough draft transcript is

15 intended to assist attorneys in their case

16 preparation and is not to be construed as the

17 final transcript. It is not to be read by the

18 witness or quoted in any pleading or for any other

19 purpose and may not be filed with any court.

20

21

22

2
UNCERTIFIED DRAFT TRANSCRIPT

1 P R O C E E D I N G S

2 VIDEO TECHNICIAN: Good morning. We are

3 going on the record at 9:05 a.m. on Friday,

4 October 26th, 2018.

5 Please note that the microphones are

6 sensitive and may pick up whispering and private

7 conversations. Please turn off all cell phones or

8 place them away from the microphones, as they can

9 interfere with the deposition audio.

10 Audio and video recording will continue

11 to take place unless all parties agree to go off

12 the record.

13 This is media unit 1 of the

14 video-recorded deposition of John Gore, taken by

15 counsel for the plaintiff, in the matter of the

16 New York Immigration Coalition, et al. Versus the

17 United States Department of Commerce, et al.

18 This case is filed in the United States

19 District Court for the southern district of New

20 York.

21 This deposition is being held at the law

22 offices of Covington & Burling, LLP, located at

1 850 Tenth Street, Northwest, Washington, D.C.

2 20001.

3 My name is Dan Reidy from the firm

4 Veritext Legal Solutions, and I'm the

5 videographer. The court reporter is Christina

6 Hotsko from the firm Veritext Legal Solutions.

7 I'm not authorized to administer an oath,

8 I'm not related to any party in this action, nor

9 am I financially interested in the outcome.

10 Counsel and all present in the room will

11 now state their appearances and affiliations for

12 the record. If there are any objections to

13 proceeding, please state them at the time of your

14 appearance, beginning with the noticing attorney.

15 MR. HO: Detail Ho for the New York

16 Immigration Coalition plaintiffs.

17 Jonathan Topaz for NYC Plaintiffs.

18 Denise Hulett for Lupe Plaintiffs.

19 Dorian Spence for the City of San Jose.

20 Eri Andriola for the Lupe Plaintiffs.

21 John Greenbaum for the City of San

22 Jose...

1 Tina Thomas for the Kravitz Plaintiffs.

2 Rebecca Kopplin from the Department of

3 Justice.

4 Alice Lacour from the Department of

5 Justice.

6 Brett Shumate from the Department of

7 Justice.

8 Josh Gardner for the Department of

9 Justice on behalf of the Defendants.

10 Andrew Saindom on behalf of the District

11 of Columbia.

12 Valerie Nannery from the District of

13 Columbia.

14 Dave Dorey dory from the Department of

15 Commerce.

16 David Dorey from the Department of

17 Commerce.

18 Whereupon,

19 JOHN GORE,

20 being first duly sworn or affirmed to testify to

21 the truth, the whole truth, and nothing but the

22 truth, was examined and testified as follows:

5

UNCERTIFIED DRAFT TRANSCRIPT

1 BY MR. HO:

2 Q. Mr. Gore, have you been deposed before?

3 A. No.

4 Q. But you have been in depositions before,

5 correct?

6 A. Yes.

7 Q. Roughly how many times have you attended

8 a deposition?

9 A. Ten.

10 Q. You understand that you're under oath

11 under penalty of perjury today?

12 A. Yes, I do.

6 MR. GARDNER: Objection.

7 Mischaracterizes the document.

8 THE WITNESS: I think what I've testified

9 to is what is here in the record, and that answer

10 speaks for itself.

11 BY MR. HO:

12 Q. Well, what did you mean by that? Were

13 you aware of any analysis as to whether or not

14 including the citizenship question on the census

15 could affect the rate at which the people respond

16 to the census?

17 A. As I said then and as I sit here today,

18 I'm not aware of any data on that issue. As I

19 firth explain, erk Ross explains he took a hard

20 look at that issue and found no empirical evidence

21 to support the conclusion there's be a reduction

22 inerance rates from reinstatement of the

35

UNCERTIFIED DRAFT TRANSCRIPT

1 citizenship question on the questionnaire.

2 Q. One more question about your testimony

3 for now, on page 27. The last question on the

4 page from representative goudy. So if

5 Secretary Ross wanted to include a question, how

6 would a court determine whether or not that was an

7 appropriate question. I mean, I guess what I'm

8 getting at is what is the standard by which you

9 judge the inclusion or exclusion of a question on

10 the census form.

11 Your response, I think that is a very
12 good question. It's probably better directed to
13 the commerce department. I'm not involved in the
14 litigation. That's being handled out, and then
15 you got cut off.

16 What do you mean when you testified on
17 May 21st that you're not involved in the
18 litigation over the citizenship question?

19 A. I am not a counsel of record in that
20 case. I have not been involved in litigating that
21 case on behalf of the United States. I have not
22 written any of the briefs, filed any of the

36
UNCERTIFIED DRAFT TRANSCRIPT

1 pleadings, or done anything like that. I um rar
2 witness in the case. Obviously sitting here
3 today. I was involved in the decision made by the
4 Department of Justice. But under Department of
5 Justice regulations, this is defensive litigation
6 being handled by the civil division, and the
7 counsel of record is in the civil division, not civil
8 rights division.

9 Q. When you say you're not counsel of
10 record, are you counsel in some other capacity in
11 this litigation?

12 MR. GARDNER: Objection. Vague.

13 THE WITNESS: No.

14 BY MR. HO:

15 Q. And you're not a party in this case,

16 right?

17 A. No.

18 Q. And neither the civil rights division nor

19 the Department of Justice itself is a party in

20 this case, right?

21 A. That's my understanding. I believe the

22 case was brought against the Department of

1 Commerce, but I've not studied the pleadings to

2 know whether the Department of Justice saparty,

3 but I believe it's not.

4 Q. You wouldn't describe yourself as a

5 consultant giving legal advice to counsel of

6 record in this case, would you?

7 A. No.

8 Q. Mr. Gore you sometimes use private --

9 A. I believe I may have done that. Yeah.

10 Q. Which of those things have you used for

11 DOJ work before?

12 A. Actually, I don't think I have used it

13 for DOJ work, now that I think about it.

14 Q. You've sometimes sent e-mails between

15 your personal g mail account and DOJ account?

16 A. I have done that, yes.

5 BY MR. HO:

6 Q. This is an e-mail to you dated
7 September 22nd, 2017. Just so the record is
8 clear, this was produced to us in discovery, the
9 electronic /SRERGZ has a file name that's stamped
10 DOJ 30651, but the document itself does not bear a
11 Bates number.

12 Mr. Gore, this is an e-mail to you from
13 cumeal lugor tory?

14 A. Yes.

15 Q. And it's dated September 22nd, 2017?

16 A. Correct.

17 Q. And this e-mail informs you that James
18 utmier from the Department of Commerce called to
19 speak with you, correct?

20 A. That's correct.

21 Q. Prior to this e-mail, had you spoken with
22 Mr. Uthmeier about the citizenship question?

104
UNCERTIFIED DRAFT TRANSCRIPT

1 A. I don't recall.

2 Q. You and Mr. Uthmeier had been colleagues
3 at Jones day, correct?

4 A. Correct.

5 Q. You knew each other from your time there,
6 correct?

7 A. Yes.

8 Q. Since -- did you socialize with

9 Mr. Uthmeier?

10 A. Not regularly, no.

11 Q. But at some point, if not regularly, you

12 socialized with him?

13 A. I might have spent time with him at

14 events sponsored by the law firm.

15 Q. Between the time you became a DOJ

16 employee and the date that you received this

17 e-mail, September 22nd, 2017, did you have any

18 other conversations with Mr. Uthmeier?

19 A. Not that I can recall.

20 Q. And at the time Mr. Uthmeier -- at the

21 time of this e-mail, Mr. Uthmeier worked in the

22 general counsel's office in the commerce

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1 department, correct?

2 A. That's correct.

3 Q. To the best of your knowledge,

4 Mr. Uthmeier does not have any Voting Rights Act

5 enforcement responsibilities, correct?

6 A. Correct.

7 Q. And to the best of your knowledge,

8 Mr. Uthmeier does not have any experience

9 enforcing the Voting Rights Act, correct?

10 A. That is correct as well. Yeah.

11 Q. Did you ever return Mr. Uthmeier's call?

12 A. Yes. I believe I did.

13 Q. Roughly when?

14 A. Sometime around when I received this

15 /PHAES. I can't remember if it was that day or

16 the following week.

17 Q. Roughly how long did you speak with

18 Mr. Uthmeier?

19 A. Not particularly long. Maybe 15 or

20 20 minutes.

21 Q. Did you talk to him about the citizenship

22 question?

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1 A. Yes, among other things.

2 Q. At some point you received a note and a

3 memo from Mr. Uthmeier concerning the citizenship

4 question, correct?

5 A. That's correct.

6 Q. Was the note handwritten?

7 A. Yes, it was.

8 Q. How was the note transmitted to you?

9 A. Along with the memo, it was delivered to

10 my office.

11 Q. When did you receive the note and memo?

12 A. I don't recall exactly.

13 Q. Was it after receiving this phone call to

14 your office from Mr. Uthmeier on September 22nd,

15 2017?

16 A. I believe so, yes.

17 Q. Was it before the Department of Justice

18 sent its letter to the Census Bureau on

19 December 12, 2017, requesting the citizenship

20 question?

21 A. Yes.

22 Q. You showed that note to other people,

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1 right?

2 A. Yes.

3 Q. Who did you show that note to?

4 A. I showed it to -- I know I've shown it to

5 cath leantumey in the civil rights division as

6 part of the document collection. And I understand

7 that it was shown to a couple of other people in

8 the civil division who are responsible for

9 litigating this case on behalf of the United

10 States.

11 I don't recall showing it to anyone else.

12 Q. Do you know if anyone to whom you showed

13 the note showed it to anyone else?

14 A. I don't.

15 Q. Did you ever have any discussions with

16 anyone about the note?

17 A. No, I don't believe so.

18 Q. You just showed it to some people but you

19 never discussed it?

20 A. Oh, I showed it to them after receive

21 agdocument request in this litigation

22 /SKWAO*EURBGS gave it to them as part of the

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1 collection of documents responsive to that --

2 potentially responsive to that request.

3 I may have had a question with ben agnaga

4 about it, but I don't recall.

5 Q. Did the note solicit legal advice from

6 you?

7 A. No.

8 Q. And you didn't provide legal advice in

9 response to that note, correct?

10 A. I believe I may have, actually.

11 Q. You testified earlier you weren't

12 providing legal advice in connection with to the

13 citizenship question question, I thought.

14 MR. GARDNER: Objection.

15 Mischaracterizes the witness' prior testimony.

16 THE WITNESS: I don't believe that was my

17 testimony.

18 BY MR. HO:

19 Q. Okay. So you think you did provide legal

20 advice to Mr. Uthmeier in response to the memo?

21 A. Now you've changed the question.

22 Q. Yeah.

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1 A. No, I didn't provide legal advice to

2 Mr. Uthmeier.

3 Q. Did you provide legal advice to the

4 Department of Commerce in response to the note

5 from Mr. Uthmeier?

6 A. I did discuss -- now that you mention it,

7 I did discuss the note with Mr. Uthmeier and

8 Mr. Davidson.

9 Q. Did you provide legal advice to the

10 Department of Commerce in connection with the note

11 from Mr. Uthmeier?

12 A. Yes.

13 Q. At this point were you anticipating

14 litigation over the possibility of including a

15 citizenship question in the census?

16 A. I'm sorry, can you say that again?

17 Q. At this point --

18 A. Right.

19 Q. -- when you received the handwritten note

20 from Mr. Uthmeier, were you anticipating

21 litigation over the possibility of the inclusion

22 of the citizenship question on the census?

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1 A. Absolutely.

2 Q. Did the -- was the note shared with you

3 in anticipation of litigation over the citizenship

4 question?

5 MR. GARDNER: Objection. Lack of

6 foundation. Calls for speculation.

7 BY MR. HO:

8 Q. If you know?

9 A. That would be speculating. I don't know.

10 Q. Did the note state one way or the other

11 whether or not it was prepared in anticipation of

12 litigation?

13 A. I don't recall that it did.

14 Q. Did it state whether or not it was

15 requesting legal advice from you?

16 A. Yes, it did.

17 Q. Your answer is it was requesting legal

18 advice, the note?

19 A. Yes.

20 Q. Did you -- let me start this again.

21 Did the Department of Justice rely on

22 that note in drafting its request to the Census

1 Bureau to include a citizenship question on the

2 census?

3 MR. GARDNER: Objection. Vague.

4 THE WITNESS: The note contained

5 information regarding that issue that was

6 considered by the Department of Justice in

7 drafting its request.

8 BY MR. HO:

9 Q. Does inform -- did -- does any

10 information contained on that note /PA*ERP in the

11 Department of Justice's letter to the Census

12 Bureau requesting a citizenship question on the

13 2020 census?

14 MR. GARDNER: Objection. To the extent

15 that calls for discloche... /TK*EUGS /TK*EUGS. To

16 the extent you can answer that question without

17 divulging that, you may. Otherwise, I instruct

18 you not to answer.

19 A. Consistent with that instruction, I can't

20 answer that question.

21 MR. HO: Just so I understand the

22 question, even if information was on that letter

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1 that became public, your position is that's

2 protected from my question about whether or not --

3 MR. GARDNER: Your question wasn't

4 whether it was expressly incorporated by

5 reference. At which I would agree with you, that

6 would waive the privilege. You asked if

7 information in that letter was somehow used in

8 forming the letter. That is classic deliberative

9 process.

10 MR. HO: I don't think that's what my

11 question --

12 MR. GARDNER: Ask it again.

13 BY MR. HO:

14 Q. Does information on the handwritten note

15 from Mr. Uthmeier appear in the Department of

16 Justice's letter requesting a citizenship question

17 on the 2020 census questionnaire?

18 MR. GARDNER: Same objection. Same

19 instruction.

20 THE WITNESS: Consistent with that

21 instruction, I can't answer.

22 (Gore Deposition Exhibit 11 marked for

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1 identification and attached to the

2 transcript.)

3 BY MR. HO:

4 Q. This is Exhibit 11. This is an e-mail --

5 Chris heron dated November 1st, 2017, with a cc to

6 ben agwinaggy, correct?

7 A. That is correct.

8 Q. Chris heron is the chief of the voting

9 section, correct?

10 A. Yes. And a great lawyer.

11 Q. The subject line of your e-mail is,

12 confidential and closehold draft letter, correct?

Exhibit 6

To: Comstock, Earl (Federal) PII
From: Uthmeier, James (Federal) Case 1:18-cv-02921-JMF Document 414-6 Filed 10/28/18 Page 2 of 12
Sent: Fri 8/11/2017 8:05:48 PM
Importance: Normal
Subject: Re: Census paper
Received: Fri 8/11/2017 8:05:51 PM
Census Memo Draft Aug 11 2017.docx

Thanks Earl, clean copy attached. I can swing a call any time after 4:30 today.

James

From: Comstock, Earl (Federal)
Sent: Friday, August 11, 2017 3:40 PM
To: Uthmeier, James (Federal)
Subject: Re: Census paper

Thanks James. Please take a look at the attached edits. If you agree then we can send to the Secretary, who wanted to have a call today to discuss. Earl

From:"Uthmeier, James (Federal)" < PII
Date:Friday, August 11, 2017 at 10:18 AM
To:"Comstock, Earl (Federal)" < PII >
Subject:Re: Census paper

Made a couple small edits for clarity. Also, I have not yet sent this to Peter. Just let me know if you want me to loop him in-- I think he is heading out pretty early today, and I'm tied up 11-1, but maybe we can walk through with him early next week.

From:Uthmeier, James (Federal)
Sent: Friday, August 11, 2017 9:55:52 AM
To: Comstock, Earl (Federal)
Subject: Re: Census paper

Earl-

A draft, predecisional and privileged memo is attached. I know he likes short briefing materials, but I wanted to be more thorough given the issue and our uncertainty regarding the exact question(s) being presented.

I will keep working to clean it up and am happy to incorporate any edits. I am out of the office for some MBDA and infrastructure meetings but can be reached on my cell. I'll be able to talk today other than 11-1. Will be working over the next hour to clean this up a bit.

If you want to provide some handwritten comments, you can deliver to Barb (OGC secretary) and she will get them to me quickly.

I have some new ideas/recommendations on execution that I look forward to discussing. Ultimately, we do not make decisions on how the data should be used for apportionment, that is for Congress (or possibly the President) to decide. I think that's our hook here.

Best,

James

From: Comstock, Earl (Federal)
Sent: Friday, August 11, 2017 8:11:41 AM
To: Uthmeier, James (Federal)
Subject: Re: Census paper

Great. Thanks! Earl

Sent from my iPhone

> On Aug 11, 2017, at 7:45 AM, Uthmeier, James (Federal) <[REDACTED] PII [REDACTED]> wrote:
>
> Earl-
>
> Finishing this up this morning and will have a memo to you by 930.
>
> James
>
> Sent from my iPhone

From: Comstock, Earl (Federal) [REDACTED]@doc.gov]
Sent: 8/16/2017 8:44:41 PM
To: Teramoto, Wendy (Federal) [REDACTED]@doc.gov]
CC: Wilbur Ross [REDACTED]
Subject: Re: Memo on Census Question

Thanks Wendy. That works for me. Earl

From: Wendy Teramoto <[REDACTED]@doc.gov>
Date: Wednesday, August 16, 2017 at 4:24 PM
To: "Comstock, Earl (Federal)" <[REDACTED]@doc.gov>
Cc: Wilbur Ross <[REDACTED]>
Subject: Re: Memo on Census Question

Peter Davidson and Karen Dunn Kelly will both be here Monday. Let's spend 15 min together and sort this out. W

Sent from my iPhone

On Aug 11, 2017, at 4:12 PM, Comstock, Earl (Federal) <[REDACTED]@doc.gov> wrote:

Mr. Secretary –

Per your request, here is a draft memo on the citizenship question that James Uthmeier in the Office of General Counsel prepared and I reviewed. Once you have a chance to review we should discuss so that we can refine the memo to better address any issues.

Before making any decisions about proceeding I would also like to bring in Peter Davidson and Census counsel to ensure we have a comprehensive analysis of all angles.

Thanks. Earl

<Census Memo Draft2 Aug 11 2017.docx>

To: Uthmeier, James (Federal) [REDACTED]
From: Shambon, Leonard (Federal) [REDACTED] **Case 1:18-cv-02921-JMF Document 414-6 Filed 10/28/18 Page 6 of 12**
Sent: Fri 8/11/2017 6:56:17 PM
Importance: Normal
Subject: RE: Census paper
Received: Fri 8/11/2017 6:56:19 PM

Got it and will shoot you the timeline. Updating it now.

Leonard M. Shambon

Special Legal Advisor

Office of the Chief Counsel for Economic Affairs

U.S. Department of Commerce

[REDACTED]

From: Uthmeier, James (Federal)
Sent: Friday, August 11, 2017 1:59 PM
To: Shambon, Leonard (Federal) [REDACTED]
Subject: Fwd: Census paper

Hey Lenny,

I just wanted to shoot you a current copy of the census paper. Earl is currently reviewing, [REDACTED]

[REDACTED]

Thank you and happy Friday!

James

Begin forwarded message:

From: "Uthmeier, James (Federal)" [REDACTED]
Date: August 11, 2017 at 10:18:56 AM EDT
To: "Comstock, Earl (Federal)" [REDACTED]
Subject: Re: Census paper

Made a couple small edits for clarity. [REDACTED]

To: Shambon, Leonard (Federal) [REDACTED]
From: [REDACTED] Case 1:18-cv-02921-JMF Document 414-6 Filed 10/28/18 Page 8 of 12
Sent: Mon 8/14/2017 3:12:43 PM
Importance: Normal
Subject: Re: Census paper
Received: Mon 8/14/2017 3:12:45 PM

Thanks Lenny.

On Aug 14, 2017, at 11:04 AM, Shambon, Leonard (Federal) <[REDACTED]> wrote:

Had some small edits to the last draft which I'll incorporate into the current draft.

Leonard M. Shambon

Special Legal Advisor

Office of the Chief Counsel for Economic Affairs

U.S. Department of Commerce

[REDACTED]

From: Uthmeier, James (Federal)
Sent: Monday, August 14, 2017 9:51 AM
To: Shambon, Leonard (Federal) <[REDACTED]>
Subject: FW: Census paper

Updated version.

To: Shambon, Leonard (Federal)
From: Uthmeier, James (Federal)
Sent: Mon 8/14/2017 1:50:48 PM
Importance: Normal
Subject: FW: Census paper
Received: Mon 8/14/2017 1:50:00 PM
Census Memo Draft Aug 11 2017.docx

Updated version.

To: Comstock, Earl (Federal)
From: Uthmeier, James (Federal)
Sent: Fri 8/11/2017 8:05:48 PM
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Subject: Re: Census paper
Received: Fri 8/11/2017 8:05:51 PM
Census Memo Draft Aug 11 2017.docx

Thanks Earl, clean copy attached. I can swing a call any time after 4:30 today.

James

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Sent: Friday, August 11, 2017 3:40 PM
To: Uthmeier, James (Federal)
Subject: Re: Census paper

Thanks James. Please take a look at the attached edits. If you agree
[REDACTED]
[REDACTED] Earl

From: "Uthmeier, James (Federal)" <[REDACTED]>
Date: Friday, August 11, 2017 at 10:18 AM
To: "Comstock, Earl (Federal)" <[REDACTED]>
Subject: Re: Census paper

Made a couple small edits for clarity.
[REDACTED]

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Sent: Friday, August 11, 2017 9:55:52 AM
To: Comstock, Earl (Federal)
Subject: Re: Census paper

Earl-

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I will keep working to clean it up and am happy to incorporate any edits. I am out of the office [REDACTED]
[REDACTED] but can be reached on my cell. I'll be able to talk today other than 11-1. Will be working over
the next hour to clean this up a bit.

If you want to provide some handwritten comments, you can deliver to Barb (OGC secretary) and she will get them to
me quickly.

[REDACTED]

Best,

James

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Sent: Friday, August 11, 2017 8:11:41 AM
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Subject: Re: Census paper

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Sent from my iPhone

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